

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DIANNA L. SMITH)	
Claimant)	
VS.)	
)	Docket Nos. 206,033 & 220,001
NATIONAL VISION CENTER)	
Respondent)	
AND)	
)	
HARTFORD ACCIDENT & INDEMNITY COMPANY)	
AND TRAVELERS INDEMNITY COMPANY)	
Insurance Carriers)	

ORDER

Respondent and both of its insurance carriers requested review of the preliminary hearing order dated February 13, 1997, entered by Administrative Law Judge Robert H. Foerschler.

ISSUES

The Administrative Law Judge found claimant provided respondent with timely notice of accident and ordered both Hartford Accident & Indemnity Company and Travelers Indemnity Company to share the medical expense incurred for treatment of claimant's left upper extremity. The issues before the Appeals Board on this review are:

- (1) Whether claimant sustained personal injury to the left upper extremity which arose out of and in the course of her employment with the respondent.
- (2) The appropriate date of accident for the left upper extremity injury.

- (3) Whether claimant provided respondent with timely notice of accident.
- (4) Which insurance carrier should be responsible for payment of benefits?
- (5) May Travelers Indemnity Company avoid liability because it did not formally attend the preliminary hearing held before the Administrative Law Judge on January 23, 1997?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

For preliminary hearing purposes, the Appeals Board finds as follows:

The preliminary hearing order should be modified to require the respondent and Travelers Indemnity Company to provide claimant the workers compensation benefits related to the left upper extremity injury.

Claimant worked for the respondent from December 1993, through August 18, 1996. During that period claimant developed both right and left carpal tunnel syndrome. In February 1995 claimant began to experience symptoms in her right shoulder and her right arm. Claimant's right upper extremity symptoms progressed until she ultimately underwent right carpal tunnel release surgery in November 1995. After being off work for approximately one month, claimant returned to work for the respondent and began to develop carpal tunnel symptoms in her left arm. Claimant's left arm symptoms progressively worsened until she left work on August 18, 1996. Claimant sought this preliminary hearing to request medical treatment for the left upper extremity injury.

During the period that claimant worked for respondent, respondent changed insurance carriers. As of October 19, 1995, Travelers Indemnity Company replaced Hartford Accident & Indemnity Company as respondent's workers compensation carrier.

Claimant initially claimed workers compensation benefits for a February 4, 1995, accidental injury to the right upper extremity. That claim was assigned Docket No. 206,033. The parties represent that in February 1996, claimant amended her Application for Hearing in that proceeding to also allege a February 4, 1995, accidental injury to the left upper extremity. The preliminary hearing which generated this appeal was held before the Administrative Law Judge on January 23, 1997. Four days after that hearing, claimant filed a new Application for Hearing with the Division of Workers Compensation alleging a left upper extremity injury which occurred on or about July 15, 1996, and each and every day she worked thereafter. That claim was assigned Docket No. 220,001. When the Administrative Law Judge issued the February 13, 1997, order, he referenced Docket No. 220,001.

At the preliminary hearing held on January 23, 1997, Hartford's attorney appeared along with Travelers' attorney who announced that Travelers was not a party to the proceeding because the alleged accident date preceded the date it began providing insurance coverage. After that announcement Travelers' attorney remained at the hearing but did not participate in claimant's examination.

During the preliminary hearing, the facts established that in either late 1995 or early 1996 claimant began to experience left upper extremity symptoms which progressively worsened while she continued to perform repetitive activities for the respondent. In July 1996, claimant's symptoms had worsened to the point where she sought medical treatment for the left arm. Due to her symptoms, claimant left her employment with respondent on August 18, 1996.

Based upon those facts, Hartford contends claimant's left upper extremity injury developed after it had terminated coverage on October 19, 1995, and, therefore, it should not be held responsible for the injury. Travelers argues it should not be held responsible for that injury because it was not respondent's insurance carrier on the date selected by claimant as her accident date on the Applications for Hearing filed with the Division of Workers Compensation in Docket No. 206,033.

Because of the close relationship between the claims in Docket Nos. 206,033 and 220,001, the Appeals Board strongly recommends those two proceedings be consolidated for purposes of litigation, award, and appeal, if any. As indicated above, Docket No. 206,033 was formally amended and now includes a claim for both right and left upper extremity injuries.

The Appeals Board also finds that it is more probably true than not that claimant sustained personal injury by accident which arose out of and in the course of employment with respondent and which caused the left upper extremity injury. Because the evidence indicates that claimant's accidental injury to the left arm occurred over a period of time and was caused by repetitive mini-traumas, the appropriate date of accident for the period of left arm injury is claimant's last day of work on August 18, 1996. Therefore, respondent and its insurance carrier on that date, Travelers Indemnity Company, are responsible for providing medical treatment for the left upper extremity and any related temporary total disability benefits.

The Appeals Board also finds that claimant provided respondent with timely notice of accidental injury. As indicated above, the parties represented that claimant filed an amended Application for Hearing in February 1996 in Docket No. 206,033 that indicated she was claiming injury to the left upper extremity. That document placed respondent on notice of claimant's accidental injury involving the left upper extremity which happened to be ongoing in nature.

For preliminary hearing purposes, claimant's failure to amend the claim in Docket No. 206,033 to include accidental injury to the left upper extremity through the last day of work in August 1996 is not fatal. See Pyeatt v. Roadway Express, Inc., 243 Kan. 200, 756 P.2d 438 (1988).

Travelers' argument that it was not a proper party at the January 23, 1997, preliminary hearing is without merit. Travelers' liability is derivative to that of respondent's. Claimant established her right to workers compensation benefits at that hearing for an ongoing accidental injury to the left upper extremity which progressively worsened through claimant's last day of work August 18, 1996. Therefore, the respondent is responsible for providing workers compensation benefits for that August 18, 1996, accident. Likewise, respondent's workers compensation carrier on that date is also responsible for those benefits whether or not it formally attended the hearing. Should Travelers now wish to present evidence regarding the issues in controversy, the Administrative Law Judge may consider the procedural path which claimant has followed which is responsible, in part, for the confusion which has been created in determining whether Travelers should be permitted to introduce additional evidence for preliminary hearing purposes.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing order dated February 13, 1997, entered by Administrative Law Judge Robert H. Foerschler should be, and hereby is, modified; that the appropriate date of accident for the left upper extremity is August 18, 1996; and that for preliminary hearing purposes respondent and Travelers Indemnity Company are responsible for providing workers compensation benefits for claimant's left upper extremity injury.

IT IS SO ORDERED.

Dated this ____ day of April 1997.

BOARD MEMBER

c: Frank D. Eppright, Kansas City, MO
Mark J. Hoffmeister, Overland Park, KS
Bryce Moore, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director